

**Bro-Tech Corp. t/a Purolite and Teamsters Local 107, affiliated with International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 4-RC-17846**

December 16, 1994

**SUPPLEMENTAL DECISION AND  
CERTIFICATION OF REPRESENTATIVE**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 17, 1992, and the hearing officer's report recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 35 for and 30 against the Petitioner, with 1 void and 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>2</sup> and recommendations<sup>3</sup> only to the extent consistent with this decision, and finds that a certification of representative should issue. (Relevant portions of the hearing officer's report are attached.)

The hearing officer concluded that the Petitioner's broadcast of Teamsters songs from a soundtruck parked outside the plant on the day of the election violated the Board's prohibition of campaign speeches set forth in *Peerless Plywood Co.*, 107 NLRB 427 (1953). Thus, the hearing officer recommended that Objection 4(a) be sustained, that the election results be set aside, and that a second election be ordered. The Petitioner excepts to the hearing officer's finding and recommendation, arguing that the Teamsters songs do not constitute "campaign speech." We find merit in the Petitioner's argument.

In *Peerless Plywood*, the Board established a prohibition of election speeches by either party, union or employer, on company time to massed assemblies of employees within the 24 hours before an election. 107

<sup>1</sup> On July 13, 1992, the Board issued a Decision and Order Remanding (unpublished), in which it adopted the Acting Regional Director's report on objections wherein he recommended that certain employer objections be overruled and that a hearing be held on the Employer's Objections 4(a) and 6.

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>3</sup> We agree with the hearing officer that the union observer's conduct during the election did not constitute improper electioneering that requires setting aside the election; thus, we adopt the hearing officer's recommendation that the Employer's Objection 6 be overruled.

NLRB at 429.<sup>4</sup> The Board formulated this narrow limitation to address its concern that such speeches "have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. . . . Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party . . . who in this manner obtains the last most telling word." *Id.* The paramount purpose of the rule was to ensure that elections remain free. The prohibition was not meant to "interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election, nor [to] prohibit the use of any other legitimate campaign propaganda or media." *Id.* at 430 (emphasis added).

The Board has consistently applied the *Peerless Plywood* rule to cases in which a union has broadcast campaign speech into the plant from a soundcar within the 24 hours before the election. See *Industrial Acoustics Co.*, 297 NLRB 387 (1989), enf. denied 912 F.2d 717 (4th Cir. 1990); *Crown Paper Board Co.*, 158 NLRB 440 (1966); *U.S. Gypsum Co.*, 115 NLRB 734 (1956); and *Underwood Corp.*, 108 NLRB 1368 (1954). Each of these cases examined, among other things, whether or not the employees were on company time and could hear the broadcast inside the plant.<sup>5</sup>

The facts of this case present the question of whether the Teamsters songs constitute "campaign speech" that is prohibited by *Peerless Plywood*.<sup>6</sup> Resolution of that narrow but threshold issue is determinative of the *Peerless Plywood* issue before us, because it is undisputed that the Petitioner's soundcar broadcasts were heard at many workstations from approximately 7 a.m. to 4:30 p.m. on the day of the election.

The hearing officer concluded that the lyrics of the Teamsters songs included "campaign phrases" that

<sup>4</sup> Prior to *Peerless Plywood*, the Board applied a broader prohibition and found that any speech by an employer at the plant prior to the election was a ground for setting the election aside, unless the employer gave the union an equal opportunity to reply. *Bonwit Teller, Inc.*, 96 NLRB 608 (1951). This broad rule was reversed in *Livinston Shirt Co.*, 107 NLRB 400 (1953), in which the Board held that an employer can lawfully make a campaign speech to the employees at the plant without providing the union an opportunity to reply on the company premises.

<sup>5</sup> The Board found the conduct to be objectionable only in *U.S. Gypsum*, in which the employees could clearly hear the union's speeches inside the plant during workhours. In the other three cases, the Board found that the conduct was not objectionable where the speeches were broadcast during lunch hours, during shift changes, or while the employees were at the timeclock punching in or out.

<sup>6</sup> There was some disagreement between the Employer and the Petitioner over whether the election day broadcast included non-Teamsters songs. We agree with the hearing officer that it is not necessary to resolve this dispute because our decision is not affected by whether or not the Teamsters songs were interspersed with non-Teamsters songs.

were calculated to sway employees' votes by describing how the Petitioner, if elected, would benefit the employees. The hearing officer characterized the Teamsters songs as "traditional campaign speech set to music" and distinguished the songs in this case from mere exhortations to vote for a union accompanied by music. The lyrics found objectionable by the hearing officer include: "the brotherhood of Teamsters will always be right here"; "your union's by your side; as long as we're together our numbers will increase"; "this will be our motto: prosperity and peace"; "carving out a better life"; "working hard for what is fair"; and "united we stand tall."

Contrary to the hearing officer, we find that the Teamsters songs are more similar to appeals to vote set to music, which have been found *not* to violate the *Peerless Plywood* prohibition. *Crown Paper*, supra. The prohibition established in *Peerless Plywood* was intended to be a narrow limitation on the parties' freedom of speech. See *Livingston Shirt*, supra, 107 NLRB 407-408. It is in the context of applying a limited prohibition on campaign speech that we examine the facts of this case.

The lyrics of the two Teamsters songs do not make any specific campaign promises; do not address wages, hours, terms or conditions of employment or other collective-bargaining issues; do not refer in any way to the Employer; and indeed, do not contain specific appeals to vote in favor of the Petitioner. These phrases do not convey the type of message that requires a response or rebuttal from the employer. We find that the broad and amorphous quality of the lyrics would not create the type of "mass psychology" that concerned the Board in *Peerless Plywood*. As the Board explained in *Crown Paper*, "[i]n our experience, soundtrack appeals are seldom utilized for argument or persuasion. Rather they are used as reminders of the forthcoming election and as appeals to the electorate to 'get out and vote'—with an indication of the favored choice thrown in. As such, they come neither within the specific scope of *Peerless Plywood* nor its underlying rationale." 158 NLRB at 445.

For these reasons, we conclude that the Petitioner's broadcast of Teamsters songs from a soundcar parked outside the plant on the day of the election was insufficient to interfere with the free choice of the employees and is not conduct that breaches the *Peerless Plywood* prohibition of certain campaign speech.<sup>7</sup> Accordingly,

<sup>7</sup>For the same reasons that we do not find the Petitioner's conduct objectionable under *Peerless Plywood*, we find no merit in the Employer's argument that the Petitioner's broadcast of the Teamsters songs constituted improper electioneering "at or near the polls" under *Alliance Ware*, 92 NLRB 55 (1950). In addition, we find it significant that although *Alliance Ware* is a soundcar case, it predates *Peerless Plywood* and the Board's application of the *Peerless Plywood* rule in soundcar cases. See *Underwood*, supra; *U.S. Gypsum*, supra; *Crown Paper*, supra; and *Industrial Acoustics*, supra.

because we are adopting the hearing officer's recommendation that we overrule the only other objection at issue, we shall issue a certification of representation.

### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 107, affiliated with the International Brotherhood of Teamsters, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time production, maintenance, warehouse, and laboratory employees, but excluding all other employees including office clerical employees, guards and supervisors as defined by the Act.

Chairman Gould questions whether *Peerless Plywood* is applicable in the circumstances of this case, but need not reach that issue here in light of our disposition of the matter.

### APPENDIX

#### HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

##### Objection 4(a)

Employer's Objection 4(a) alleges that Teamsters Local 107 Business Agent William Hamilton and 10 to 15 Teamsters members appeared at the plant on the day of the election with a soundtrack which blared prounion speeches and songs throughout the day, which could be heard within the plant and in the voting areas during the course of the election, in violation of *Peerless Plywood Co.*, 107 NLRB 427 (1953).

It is undisputed that on the day of the election, July 17, 1992, the Petitioner broadcasted music from a soundtrack parked on G Street, the street adjacent to the Employer's facility, from approximately 7 a.m. to 4:30 p.m. The election was held in the first floor conference room of the Employer's facility in two sessions from 7:45 to 9:45 a.m. and from 3:30 to 4:30 p.m.

In response to a subpoena duces tecum served on the Petitioner, the Petitioner produced the audio cassette which was broadcast from the soundtrack on the day of the election. The cassette which was entered into evidence as Employer's Exhibit 1, contains a selection of six popular non-Teamsters songs interspersed with two Teamsters songs.<sup>3</sup> The same sequence of songs is repeated on both sides of the tape.

In support of this objection, the Employer presented Plant Manager Gary Gresham and numerous employee witnesses who testified that they repeatedly heard only the Teamsters songs coming from the soundtrack on the day of the election while they were working at their work stations as well as in other areas both inside and outside the plant. These witnesses testified that they either did not hear, or did not recall hear-

<sup>3</sup>The songs included on the tape listed sequentially are: "The Bird," "Proud to be a Teamster," "Burning Bridges," "Celebration," "We are the Champions/We will Rock You," "The Twist," Teamsters Anthem, and "When the Saints Come Marching In."

ing, any of the non-Teamsters popular songs which are contained on the tape. All of the employee witnesses, however, testified with certainty that they did not hear the soundtrack broadcast while they were in the voting area.

Plant Manager Gary Gresham testified that he saw a huge soundtrack arrive at the facility at 7 a.m. and heard music which he characterized as "very loud, campaign, college football, rah, rah rowdy type music" but that the only lyrics he could recall were "brothers and sisters unite." Gresham specifically denied hearing the other popular songs on the tape at any time during that day. Gresham testified that he heard this "pro-union" music at various locations throughout the plant during his workday, with the exception of the Cation Department where the sounds of machinery drowned out the music from the soundtrack.

Lab Technician Catherine Heizman testified that at approximately 7 a.m., employee Tony Aveles entered her lab and told her to come outside to see what was going on. Heizman testified that she then left the plant and went outside into the parking lot where she saw approximately 15 to 20 employees in the parking lot near the soundtrack and saw other employees there entering and leaving for the shift change which took place at that time. She stated that she heard the soundtrack blaring "we are united, we are like unbeatable, we can do anything as long as we're together." Heizman remained in the parking lot for approximately 20 minutes and then returned to her lab on the second floor of the plant. Heizman reported that she heard the same message described above, continually and repeatedly throughout the day, while she was working in her lab, while on break, and while at lunch. In her testimony, Heizman also recalled the lyrics as "we're united, we're together, we're brothers." Heizman testified that she voted at approximately 2 p.m. and at all points along her route to the voting room she heard the same music and lyrics. Heizman stated that once she entered the voting room, she could not hear the soundtrack. Heizman reported that at the end of the day she heard the soundtrack broadcasting the song "Celebration" as the truck pulled away. Heizman denied hearing any of the other non-Teamsters songs which the Union contends were played.

Shift Leadperson Nicholas Carniglia testified that on July 17, 1992, he was not scheduled to work when he arrived at the plant sometime around 9:30 a.m. to vote, he saw the Teamsters soundtrack parked on G Street and heard loud music with lyrics he related as "stand united, brothers and sisters, come together" and "we have to stick together and unite." Carniglia testified that all along his route from the parking lot to the polling area, he heard the Teamsters song up until the time he closed the door to the polling room behind him. After voting, Carniglia testified, he again heard the same lyrics as he walked back out to his car in the parking lot to leave and that he thereafter drove away.

Process Equipment Operator David Concepcion, who works in the Cation Department, testified he went outside to the parking lot at approximately 7:15 a.m. and saw the soundtrack. Concepcion characterized the music coming out of the soundtrack as a union message with music behind it. The only lyrics of the song that Concepcion could recall were "brothers and sisters unite, unite with me." Concepcion testified that he could not hear the soundtrack in the Cation Department because of the machine noise but that when he left the department to vote during the morning ses-

sion, he heard the soundtrack repeatedly playing the same song as he walked to the polling area. Concepcion denied hearing the music in the polling area and denied hearing any of the non-Teamsters songs which appear on the tape. Concepcion left the facility at 8 a.m. at the end of his shift.

Shipping and Receiving employee Jose Garcia testified that he heard the soundtrack music when he went outside to the parking lot on his break to go to a food vendor truck. He stated that he saw approximately 7 to 10 employees standing outside by the truck and recalled the lyrics of the music as "we're brothers and sisters until the end." Garcia testified that he heard this same song all day long when he was working in the warehouse that day and that he heard the soundtrack continuously until he left the facility at 4:30 p.m. He also heard it clearly along his route to vote at approximately 3:30 p.m., but he could not hear the music while in the voting room.

The Employer presented warehouse employee Israel Rodriguez who testified that the speakers which he saw on the Teamsters soundtrack were EV brand speakers with 15- to 18-inch woofers Rodriguez stated that based on his knowledge of audio equipment he was able to determine that the type of speakers he saw on the soundtrack were the type generally used for outdoor broadcasts. Rodriguez could not recall any lyrics that came from the soundtrack with the exception of the word "Teamsters."

The Petitioner presented Business Agent William Hamilton who testified that all the songs contained on the audio cassette, including the two Teamsters songs, were played in sequence, without interruption, repeatedly throughout the day. The Petitioner did not present any other witnesses to refute the previous testimony that the soundtrack broadcast was heard within the plant during the day of the election, nor has the Petitioner argued this position in its brief.

#### Credibility

Based on the record as a whole, my observation of the demeanor of each witness while testifying under oath and the reasonable probabilities of events and statements, I make the following credibility resolutions regarding the testimony concerning the soundtrack. Throughout the course of the hearing, I carefully observed all employee witnesses who testified to hearing the soundtrack broadcast and although there were minor inconsistencies regarding certain aspects of their testimony, I have concluded all of the witnesses who testified in regard to this issue, testified honestly and credibly to the best of their knowledge and ability. The only credibility issue involved in this objection is Petitioner's assertion through Business Agent Hamilton, that the non-Teamsters songs were broadcast together with the Teamsters songs, in contradiction to the testimony of both Gresham and the employee witnesses. For reasons described below in the analysis section, I do not find it necessary to resolve this conflict in the testimony.

#### Analysis

I find that the Petitioner's broadcast of pro-Teamsters songs from its soundtrack on the day of the election violative of the Board's Rule prohibiting campaign speeches to captive audiences during the 24-hour period preceding the election,

as set forth in *Peerless Plywood*, 107 NLRB 427.<sup>4</sup> In addition in subsequent cases, the Board appears prepared to extend the *Peerless Plywood* rule to cover the actual time the election is in progress. See *O'Brien Memorial*, 310 NLRB 943 (1993). The Board has also generally found that the use of a soundtrack to broadcast campaign speeches into the plant which is audible to employees while on company time, violates the *Peerless* rule and is grounds for setting aside an election. *U.S. Gypsum Co.*, 115 NLRB 734 (1956).

Soundtrack broadcast appeals to employees which are limited to times employees are on a shift change have been found not to violate *Peerless Plywood*: see *Crown Paper Board Co.*, 158 NLRB 440 (1956), and *Underwood Corp.*, 108 NLRB 1368 (1954). However, the Board has found that prolonged soundtrack broadcasts of campaign speeches which were intended to reach employees while on worktime where they could not avoid such campaigning provide grounds for setting aside the results of an election. See *U.S. Gypsum Co.*, supra. I find that the undisputed evidence in this case demonstrates that the Petitioner broadcasted the two pro-Teamsters songs continuously throughout the day, from approximately 7 a.m. to 4:30 p.m., and therefore intended that the songs be heard during times other than shift changes, lunches, or breaks. The record contains sufficient evidence that the songs could be heard by the employees while they were at their work stations on company time. There is no requirement to show that any particular number of employees actually heard the broadcast for it to be violative of *Peerless Plywood*, and a de minimis exception to the rule has clearly been rejected by the Board. *Great Atlantic & Pacific Tea Co.*, 111 NLRB 623 (1955). Accordingly, I find that the Petitioner, in a planned and systematic manner, directed its pro-Teamsters campaign messages contained in the songs at the employees in the facility while on company time.

In order for a violation of the Board's *Peerless Plywood* rule to occur, the soundtrack broadcast heard by the employees must be considered a campaign "speech." While the Board has found that mere exhortations to vote for the Union accompanied by music, *O'Brien Memorial*, supra, or general "get out the vote" appeals, not to be campaign speeches, I find that the two Teamsters songs which were broadcast throughout the day of the election constitute campaign speeches under *Peerless Plywood* for the following reasons. The Board, in promulgating this rule, sought to prohibit last minute campaign speeches which tended to create a mass psychology that would override arguments made through other campaign media, to avoid giving an unfair advantage to the party making the campaign speech. In *Great Atlantic & Pacific Tea Co.*, supra, the Board pronounced that a preelection speech need not be "formalized" to fall within the prohibition of *Peerless*. I find that the songs broadcast into the plant on the day of the election were no different

than a speech because the lyrics of these songs<sup>5</sup> include campaign phrases such as "the brotherhood of Teamsters will always be right here"; "your Union's by your side; as long as we're together our numbers will increase"; "this will be our motto: prosperity and peace"; "carving out a better life"; "working hard for what is fair"; and "united we stand tall." These messages, although sung and accompanied by music, are clearly emotional appeals to sway voters in favor of the Petitioner by telling the voters how the Petitioner will benefit them if elected. In addition, these songs cannot be considered neutral or merely patriotic as the Petitioner argues, as they propound the Petitioner's campaign position that the Teamsters will help the employees secure "a better life" if elected. These lyrics contain significantly more meaning and are more characteristic of a speech than is the mere repetition of a slogan to vote for the Petitioner accompanied by music, which the Board determined not to be a campaign speech in *Crown Paper Board*, 158 NLRB 440. Although the songs contained no specific mention of the Employer, or any campaign issue, the message behind the lyrics is clear: the Petitioner, if elected, will be "working hard for what is fair" and "carving out a better life," bringing "prosperity and peace." Both Teamsters songs which were broadcast are traditional campaign speech themes put to music. Often, last minute campaign speeches do not focus on any specific issue but are more generalized themes of how voting for a particular party will benefit the employees. Such is the case here.

As I have found the Teamsters campaign songs that were broadcast into the plant during the election to be campaign speeches under *Peerless Plywood*, I do not find it necessary to resolve the credibility issue regarding whether or not the other non-Teamsters music was played during the election. I find that as the Petitioner, through Business Agent Hamilton, admitted that the soundtrack did play the two Teamsters songs repeatedly from approximately 7 a.m. to 4:30 p.m., the presence or absence of the other musical selections interspersed with the Teamsters songs would not have the result of mitigating the effect of the Teamsters songs, and as such, has no bearing on my finding.

The Employer, in its brief, argues an alternate theory for finding the soundtrack broadcast to be objectionable conduct, if not so found under the *Peerless Plywood* doctrine. This argument is based on the testimony of the employee witnesses who heard the Petitioner's soundtrack broadcast up until the point they entered the voting area. In this argument, the Employer contends that the audible soundtrack broadcast in the corridor leading to the voting area constitutes last minute electioneering at or near the polling place. As there is no evidence that employees were waiting in line to vote in this corridor where the broadcast was heard, and the record is clear that the broadcast could not be heard within the polling area, I do not find any basis to support such an argument.

<sup>4</sup>The record reveals that the soundtrack began broadcasting at approximately 7 a.m. The first session of the election commenced at 7:45 a.m. Thus, the soundtrack broadcasting from 7 to 7:45 a.m. falls within the 24-hour time period prior to the election.

<sup>5</sup>Although the audio cassette, Emp. Exh. 1, is in evidence, the record does not contain a transcription of the lyrics to the Teamsters songs. Therefore, a transcription of the lyrics of these songs, made from Emp. Exh. 1, is contained in Apps. 1 and 2 to this report.